Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1979.

No. 79-848

ROBERT DONOFRIO, RONALD DONTON, and ROBERT RHEN, Individually,

and

D. D. & R. COAL COMPANY, a Co-Partnership Composed of ROBERT DONOFRIO, RONALD DONTON, and ROBERT RHEN,

Petitioners,

v.

RAY MARSHALL, Secretary of Labor, U. S. Department of Labor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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D. D. & R. COAL COMPANY, A Co-Partnership Composed of ROBERT DONOFRIO, RONALD DONTON, and ROBERT RHEN,

Petitioners,

v.

RAY MARSHALL, Secretary of Labor,
U. S. Department of Labor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

AND Now, this 29th day of November, 1979, Robert Donofrio, Ronald Donton, and Robert Rhen, Individually,

and D. D. & R. Coal Company, a Co-Partnership Composed of Robert Donofrio, Ronald Donton and Robert Rhen, your Petitioners, respectfully pray that this Honorable Court grant a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Third Circuit dated September 6, 1979, by which that court affirmed the judgment of the United States District Court for the Eastern District of Pennsylvania which granted Respondent's Motion for Summary Judgment, denied Petitioners' Motion for Summary Judgment and enjoined Petitioners from denying authorized representatives of the Secretary of Labor access to their mine.

OPINIONS BELOW.

Attached hereto as Appendix A is a copy of the Judgment Order of the court below issued on September 6, 1979 by the United States Court of Appeals for the Third Circuit at its No. 79-1005 and reported at 605 F. 2d 1196 (1979); attached hereto as Appendix B is a copy of the opinion of the United States District Court for the Eastern District of Pennsylvania which is reported at 465 F. Supp. 838 (1978).

JURISDICTION.

This Honorable Court has jurisdiction to grant a Writ of Certiorari pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. § 1254(1), the judgment of the United States Court of Appeals for the Third Circuit having been entered on September 6, 1979 and the instant Petition having been filed within ninety (90) days of that date.

STATEMENT OF THE QUESTIONS PRESENTED.

1. Is the Federal Mine Safety and Health Act of 1977, 91 Stat. 1290, 30 U. S. C. §§ 801, *et seq.*, applicable to owner-operated mines such as the D. D. & R. Coal Company mine which is owned and operated by Bobby Donofrio, Ronald Donton and Robert Rhen (Petitioners here), where the owner-operators are the only individuals engaged in mining coal at their mine (i.e., they are the only "miners" within the meaning of the Act) and they do so without the benefit of employee-miners?

2. Do the inspection provisions of the Federal Mine Safety and Health Act of 1977, 91 Stat. 1290, 30 U. S. C. §§ 801, *et seq.*, which permit warrantless inspections of mines which have no employee-miners (but are mined solely by "miners" who are also the owner-"operators" within the meaning of the Act) violate the protection afforded by the Fourth Amendment to the United States Constitution against unreasonable searches where such mines hold no federal licenses to mine coal, do not mine on federal lands, are not pervasively regulated in any aspect and were not subject to mandatory comprehensive health and safety regulations until 1969?

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS.

Section 103(a) of the Federal Mine Safety and Health Act of 1977, 91 Stat. 1297, 30 U. S. C. § 813(a):

"Authorized representatives of the Secretary or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this subchapter or other requirements of this Chapter. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this chapter, and his experience under this chapter and other health and safety laws.

For the purpose of making any inspection or investigation under this chapter, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this chapter, or any authorized representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine."

Fourth Amendment to the United States Constitution:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE.

This action was commenced by Ray Marshall, Secretary of Labor, United States Department of Labor (Respondent), to enjoin Petitioners from denying Respondent's authorized representatives access to Petitioners' coal mine for the purpose of conducting inspections pursuant to the Federal Mine Safety and Health Act of 1977, 91 Stat. 1290, 30 U. S. C. §§ 801, *et seq.* (hereinafter referred to as the "Act"). This action was instituted pursuant to, and federal jurisdiction is founded upon, Section 108 of the Act, 91 Stat. 1309, 30 U. S. C. § 818.

The events which caused Respondent to institute the present action commenced on June 13, 1978 when Federal Coal Mine Inspector Michael Scheib sought to conduct a "spot inspection" of Petitioners' Diamond Slope coal mine located in Tremont, Schuylkill County, Pennsylvania pursuant to Section 103(a) of the Act, 91 Stat. 1297, 30 U. S. C. § 813(a). Mine Inspector Scheib was denied entry to the mine by Petitioners who stated that, because Mine Inspector Scheib did not possess a search warrant authorizing such an inspection, he could not conduct an inspection of the mine.

On June 15, 1978, Mine Inspector Scheib returned to Petitioners' coal mine with fellow inspector James E. Schoffstall. Federal Mine Inspectors Scheib and Schoffstall attempted, again, to conduct a "spot inspection" of Petitioners' coal mine without a search warrant authorizing such an inspection and, again, Petitioners refused to permit the warrantless inspection of their mine.[1]

1. Petitioners were cited for "denial of entry" pursuant to Section 104(a) of the Act, 91 Stat. 1297, 30 U. S. C. § 814(a). An Order of Withdrawal was then issued closing Petitioners' mine pursuant to Section 104(b) of the Act, 91 Stat. 1300, 30 U. S. C. § 814(b) and a fine in the amount of $445.00 was assessed against Petitioners for "denial of entry" pursuant to Section 110(a) of the Act, 91 Stat. 1311, 30 U. S. C. § 820(a).

On August 7, 1978, Respondent commenced this action by filing a Complaint with the United States District Court for the Eastern District of Pennsylvania seeking to enjoin Petitioners: (1) from denying authorized representatives of the Secretary of Labor entry to, upon or through their mine; (2) from refusing to permit inspection of their mine; and (3) from interfering with, hindering, or delaying the Secretary of Labor or his authorized representatives from carrying out the provisions of the Act. On that same day, Respondent filed a motion for a preliminary injunction and supporting memorandum of law.

Petitioners responded to the Secretary of Labor's Complaint and Motion for a Preliminary Injunction by claiming that the Act was not applicable to mines such as Petitioners' (which is wholly owner-operated and has no employee-miners) and by claiming that, under the Fourth Amendment guarantee of the United States Constitution, Petitioners were entitled to the production of a search warrant before being required to permit federal mine inspectors to inspect their mine, at least so far as "spot inspections" are concerned.[2]

A hearing was held regarding Respondent's Motion for a Preliminary Injunction on September 5, 1978 and Respondent's Motion was denied. Thereafter, the parties stipulated to all material facts and cross-Motions for Summary Judgment were filed.

In their Motion for Summary Judgment, Petitioners first contended that the language, stated purpose and legislative history of the Act clearly indicated that it was not intended to apply to mines such as theirs which are wholly owner-operated and which have no employee-miners.

2. For purposes of the instant proceeding, Petitioners need not —and do not—raise the Constitutionality of the warrantless nature of the quarterly inspections specifically mandated by Congress. *See* Section 103(a) of the Act, 91 Stat. 1297, 30 U. S. C. § 813(a).

With respect to this contention, the United States District Court for the Eastern District of Pennsylvania (Huyett, J.) stated:

> "Defendants argue, however, that the exemption to the Coal Mine Act for owner-operated mines is implicit in the Act's total regulatory scheme. This assertion is based upon an examination of the legislative history, in which Congress stated repeatedly that a major purpose of the Act was to prevent mine owners and operators from compromising the health and safety of miners, and upon an examination of the provisions of the statute. Defendants assert that these two sources make it clear that miners and owners or operators are not intended to be the same persons. From this conclusion, defendants infer that owner-operated mines were intended to be excluded from the Act.
>
> "We find this argument to be unpersuasive. We believe that the Coal Mine Act's broad definition of 'miner' as 'any individual working in a coal . . . mine' rebuts any inference that a 'miner' cannot also be an owner or operator. 30 U. S. C. § 802(g). This definition should be compared with the definition of 'miner' formerly employed for purposes of 'Black Lung' benefits—'any individual who is or was *employed* in a coal mine.' 30 U. S. C. § 902(d). . . ." *Marshall v. Donofrio*, 465 F. Supp. 838, 840 (1978).

Secondly, Petitioners contended in their Motion for Summary Judgment that the inspection provisions of the Act—which purportedly authorize mine inspectors to conduct warrantless inspections of all mines, including wholly owner-operated mines, in their entirety, on any of the three hundred and sixty-five days a year—are not "reasonable" under the United States Constitution as that term has been delineated by decisions of this Court.

Petitioners contended, accordingly, that they are entitled to the production of a search warrant issued by a neutral judicial officer before being required to admit federal mine inspectors into their mine. In support of their position Petitioners contended that warrantless inspections are presumptively unreasonable and, therefore, Respondent would be required to demonstrate that the present case fits within an exception to the general rule that such inspections are unreasonable. Petitioners argued that the exception to the general rule applied only where the business subject to warrantless administrative inspections is federally licensed and has been pervasively regulated for a long period of time.

The District court (Huyett, J.) rejected Petitioners' contention stating:

> ". . . we emphasize first the lengthy history of pervasive regulation in the coal mine industry, particularly in the area of safety. The coal mine industry has been regulated since the early part of this century; inspections have been authorized since 1940. In *Youghiogheny & Ohio Coal Co. v. Morton*, 364 F. Supp. 45 (S. D. Ohio 1973) (three-judge court), the court, after a detailed discussion of the history of regulation in the coal mine industry, concluded that coal mining was a closely regulated industry within the *Colonnade-Biswell* exception. We agree. Although the history of regulation may not be so long as in the alcohol or firearm industries, we believe that the history of regulation in the coal mine industry is sufficiently extensive so that anyone entering the field would be aware of the extent of the regulation and

would have little justifiable expectation of privacy with respect to safety regulation.

* * *

"Defendants argue that the *Colonnade-Biswell* exception extends only to federally-licensed businesses. However, the language used by *Barlow's* is 'closely regulated industry,' not federally licensed industry. Therefore, we do not believe federal licensure is a prerequisite to application of the *Colonnade-Biswell* exception.

"After considering all of the foregoing factors, we conclude that warrantless inspections conducted under Section 201(a) of the Coal Mine Act do not run afoul of the rationale of *Marshall v. Barlow's,* or the restraints of the Fourth Amendment.

"We therefore grant plaintiff's motion for summary judgment and enjoin the defendants from denying authorized agents of the Secretary of Labor access to their coal mine." 465 F. Supp. at 842-843.

In addition, Judge Huyett reasoned that public policy considerations, such as the interests served by mine safety legislation and the extent to which a warrant requirement would hamper the regulatory scheme, outweighed Petitioners' expectation of privacy. 465 F. Supp. at 842.

An Order was entered by the United States District Court for the Eastern District of Pennsylvania (Huyett, J.) on November 16, 1978 granting Respondent's Motion for Summary Judgment, denying Petitioners' Motion for Summary Judgment and enjoining Petitioners from denying authorized representatives of the Secretary of Labor access to their coal mine. On November 17, 1978 an Order, signed by Judge Huyett, was filed directing that

Judgment be entered in favor of Respondent and against Petitioners.

Petitioners filed a timely Notice of Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania (Huyett, J.) on November 21, 1978. Petitioners' Appeal was docketed with the United States Court of Appeals for the Third Circuit on December 31, 1978 at its No. 79-1005.

On September 6, 1979 the United States Court of Appeals for the Third Circuit issued a Judgment Order affirming the holding of the lower court. 605 F. 2d 1196. The Court of Appeals stated that:

> "After consideration of all contentions raised by appellants, and in light of our recent opinions in *Marshall v. Stoudt's Ferry Preparation Co.,* No. 78-2364 (3d Cir. July 19, 1979), and *Marshall v. Kraynak,* No. 78-2576 (3d Cir. Aug. 22, 1979), it is "ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed. . . ."

Petitioners petition herewith for review of the Judgment Order issued in this case by the United States Court of Appeals for the Third Circuit on September 6, 1979.[3]

3. The United States District Court for the Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit have, *seriatim,* stayed the mandate of their respective orders through November 29, 1979.

REASONS FOR GRANTING THE WRIT.

I. This Court Should Settle an Important Question as to the Reach of the Federal Mine Safety and Health Act of 1977, 91 Stat. 1290, 30 U. S. C. §§ 801, *et seq.*, Which Has Been Interpreted by Respondent and the Court Below, as Being Applicable to Owner-Operated Coal Mines Which Have No Employee-Miners, Notwithstanding the Facts That the Language, the Stated Purpose and the Legislative History of the Act Indicate That Owner-Operated Mines Which Have No Employee-Miners Were Not Intended to Fall Within Its Coverage.

Petitioners own and operate a coal mine in Schuylkill County, Pennsylvania. Petitioners are the only three individuals who work at their mine—no other persons are employed by Petitioners at the coal mine.

Petitioners contend here, as they did in the courts below, that the Act, which was intended to balance the competing interests of absentee owners or operators with the interests of individuals employed at the mines, is not applicable to mines such as theirs which have no employee-miners. Their position is supported by the language of the Act and its legislative history.

Section 3(d) of the Act, 91 Stat. 1290, 30 U. S. C. § 802(d), defines an "operator" as "any owner, lessee, or other person who operates, controls or supervises a coal or other mine or any independent contractor performing services or construction at such mine." This definition establishes a specific class of individuals separate and apart from the class of individuals defined as "miner" by Section 3(g) of the Act, 91 Stat. 1290, 30 U. S. C. § 802

(g).[4] In addition, the Act repeatedly refers to "miners" as those employed at a coal or other mine.[5]

Notwithstanding the foregoing, the court below affirmed, without opinion, the holding of the United States District Court for the Eastern District of Pennsylvania (Huyett, J.) in which it was stated that:

> ". . . We believe that the Coal Mine Act's broad definition of 'miner' as 'any individual working in a coal . . . mine' rebuts any inference that a 'miner' cannot also be an owner or operator. 30 U. S. C. § 802(g). . . . Miners like defendants who also operate the mines in which they work are nonetheless 'individuals[s] working in a coal . . . mine.'" *Marshall v. Donofrio*, 465 F. Supp. at 840.

The court below relied upon its prior holding in *Marshall v. Kraynak*, 604 F. 2d 231 (3d Cir. 1979), *petition for cert. filed*, 48 U. S. L. W. 3274 (Oct. 10, 1979) (No. 79-586), in affirming the holding of the United States District Court in the present case with respect to the applicability of the Act to wholly owner-operated mines which have no employee-miners.[6] In *Kraynak*, the court below stated that:

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4. "Miner" is defined as ". . . any individual working in a coal or other mine . . ."

5. *See, e.g.*, Section 101(c), 91 Stat. 1291, 30 U. S. C. § 811(c); Section 103(f), 91 Stat. 1297, 30 U. S. C. § 813(f); Section 104(g)(1), 91 Stat. 1300, 30 U. S. C. § 814(g)(1); Section 105(b)(1)(A), 91 Stat. 1303, 30 U. S. C. § 815(b)(1)(A); Section 105(c)(1), 91 Stat. 1303, 30 U. S. C. § 815(c)(1); Section 111, 91 Stat. 1312, 30 U. S. C. § 821.

6. "Operator" was defined by Section 802(d) of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 743, which was considered by the court below in *Kraynak*, as ". . . any owner, lessee, or other person who operates, controls, or supervises a coal mine . . ." "Miner" was defined by Section 802(g) of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 743, as ". . . any individual working in a coal mine . . ."

". . . The district court determined that the miner-operators came within the provisions of the Coal Mine Health and Safety Act of 1969, 30 U. S. C. §§ 801-960 (1976). We affirm for the reasons stated by the Honorable Louis Rosenberg, 457 F. Supp. 907 (W. D. Pa. 1978), and by Judge Muir in his opinion in *Secretary of the Interior v. Shingara*, 418 F. Supp. 693, 695 (M. D. Pa. 1976). Judge Rosenberg explained that although section 802(d) defines an 'operator' as one who operates, controls or supervises a mine, section 802(g) provides that a 'miner' means '*any* individual working in a coal or other mine,' 30 U. S. C. 802(d), (g) (Supp. I 1977) (emphasis added). Like the district court we feel that this statutory language is free from ambiguity and comports with the legislative purpose 'to require that . . . every miner in such mine comply with [the] standards.' 30 U. S. C. § 801 (g)(2) (Supp. I 1977). *See Marshall v. Stoudt's Ferry Preparation Co.*, 602 F. 2d 589 (3d Cir. 1979)." 604 F. 2d at 232.

The District Court in the present case purported to buttress its conclusion by citing the legislative history of predecessors to the Act.

"Finally, there is evidence that Congress was expressly made aware of the possibility that owner-operated mines would be included within the Coal Mine Act's coverage at the time the Act was amended in 1966 to extend coverage to mines employing less than fifteen men underground. *See* S. Rep. No. 1055, *reprinted at* 1966 U. S. Code Cong. & Admin. News, pp. 2072, 2087 (Statement of Senator Cooper). Although Congress was aware of the problem, it chose not to exempt such mines at that time or at any time subsequent. We cannot conclude, therefore, that the failure explicitly to exempt owner-operated mines from the Act was the result of mere inadvertence." *Marshall v. Donofrio*, 465 F. Supp. at 840. (Footnote omitted.)

However, the District Court failed to consider the legislative history of the Federal Coal Mine Safety Act Amendments of 1965 in its entirety.[7] When read as a whole this legislative history demonstrates that Congress intended that mines employing only a few miners (fewer than fifteen) be covered by mine safety legislation, but gives no indication that mine safety legislation was to include owner-operated mines which have no employee miners.

"'The purpose of this bill is to extend the mandatory safety provisions of the Federal Coal Mine Safety Act to mines regularly *employing* less than 15 men underground, which are now exempt from such requirements, and to strengthen certain other provisions of the act in order to increase the protection of lives and property in all underground coal mines, to the maximum extent feasible through legislation. Two concurrent objectives were to attain this goal with a minimum burden upon those engaged in the coal mining industry and to augment, rather than duplicate, State efforts in this field. *The safety of the men employed in coal mines, the security of their employment, and the economic well-being of the industry have been thoroughly considered and the conclusions have been adopted in the instant bill.*" [1966] 2 U. S. Code Cong. & Ad. News 2072. (Emphasis added.)

7. The comments of Senator Cooper to which the District Court alluded relate specifically to small mines which have *few employees*, not mines which are wholly owner-operated and which have *no employee-miners*. [1966] 2 U. S. Code. Cong. & Ad. News 2087.

In fact, the legislative history of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, refutes the reasoning of the courts below with respect to legislative intent to include owner-operated mines which have no employee-miners within the scope of mine safety legislation.

> "There were many deficiencies in the 1952 law and legislative attempts to correct them were made during the ensuing years. The prime objective was the elimination of the exemption enjoyed by small mines (those *employing* 14 or fewer persons underground)." [1969] 2 U. S. Code Cong. & Ad. News 2504-2505. (Emphasis added.)

When the Congress enacted the Act they transferred responsibility for enforcement from the Department of the Interior [8] to the Department of Labor.[9] This transfer was intended to bring the duty of enforcing mine safety legislation under the governmental agency best suited to protect the interests of the employee work force.

> ". . . it [the Act] moves the Mining Enforcement and Safety Administration to the Department of Labor, which has as its sole function and responsibility the protection and well-being of workers. As the mines gear up to meet our accelerated coal needs in the years ahead, it becomes more important than ever that safety not be sacrificed to production, and that there be no possibility of conflicting missions within the Department assigned to enforce and administer the mine safety laws." Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Cong. 2d Sess. 998 (1978).

8. The Federal Coal Mine Health and Safety Act of 1969 created the Mine Enforcement Safety Administration (MESA) within the Department of the Interior to enforce mine safety legislation.

9. The Act established the Mine Safety and Health Administration (MSHA) to enforce the Act and the regulations promulgated thereunder.

Congress' reasons for charging the Department of Labor with responsibility for insuring coal mine health and safety further indicate that the purpose of the Act was to balance the competing interests of mine operators and their employees.

Petitioners here respectfully request that this Court review the holding the court below—that the Act is applicable to owner-operated mines which have no employee-miners. Nowhere in the Act or its legislative history is there any indication that it was intended to apply to mines without employee-miners. A thorough reading of the Act itself reveals that the term "miner" means an employee of the operator. This in and of itself indicates the error of the court below. Further support for Petitioners' position is found in the legislative history of mine safety legislation going back to 1966.

Furthermore, the legislative history of the Federal Mine Safety and Health Act of 1977 is replete with references to miners as employees, and operators as employers.[10] These references are consistent with the purpose of the Act as set forth in its legislative history.

> "This bill is intended to strike a new balance in the longstanding antagonistic goals of maximizing production of energy and mineral resources on the one hand, and, on the other hand, affording the maximum safety and health protection for the workers who

10. *See, e.g.*, [1977] 3 U. S. Code Cong. & Ad. News 3409, 3414, 3436, 3509-3510.

extract those resources in what all recognize is inherently a highly hazardous occupation." Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Cong. 2d Sess. 908-909 (1978).

Such antagonism exists only where an absentee operator neglects the human resources of the coal industry in favor of the profits yielded by the mineral resources. This antagonism does not exist where, as in the present case, the owner-operator and miner are the same individual.

II. This Court Should Settle an Important Question of Constitutional Law Regarding Petitioners' Rights Under the Fourth Amendment to the United States Constitution by Clarifying the Scope of This Court's Decisions in *Marshall v. Barlow's, Inc.*, 436 U. S. 307 (1978); *United States v. Biswell*, 406 U. S. 311 (1972); and *Colonnade Catering Corp. v. United States*, 397 U. S. 72 (1970), Which Established the Criteria for Determining Whether Warrantless Administrative Searches of Business Establishments Conducted Pursuant to Statute Are Reasonable or Whether They Are Unconstitutional as Violative of the Search Victim's Rights Under the Fourth Amendment.

Since its decision in *Camara v. Municipal Court*, 387 U. S. 523 (1967), in which this Court reversed its holding in *Frank v. Maryland*, 359 U. S. 360 (1959)[11], this Court

11. In *Camara*, this Court stated that:

"To the *Frank* majority, municipal fire, health, and housing inspection programs 'touch at most upon the periphery of the important interests safeguarded by the Fourteenth Amendment's protection against official intrusion,' 359 U. S. at 367, because the inspections are merely to determine whether physical conditions exist which do not comply with minimum standards prescribed in local regulatory ordinances. . . .

"We may agree that a routine inspection of the physical condition of private property is a less hostile intrusion than the

has required that there be a history of federal licensing and pervasive regulation of an industry—such that the businessmen within the industry may be deemed to have impliedly consented to subject their establishments to warrantless administrative inspections—before a statute, like the instant one, purporting to grant authority for unlimited warrantless inspections can begin to pass Constitutional muster.

> "'. . . The businessman in a regulated industry *in effect consents* to the restrictions placed upon him.' *Almeida-Sanchez v. United States*, 413 U. S. 266, 271 (1973)." *Marshall v. Barlow's, Inc.*, 436 U. S. 311, 313 (1972). (Emphasis added.)

The court below erred in concluding that Petitioners' coal mining operation has been pervasively regulated and that such pervasive regulation has existed for a sufficient period of time to conclude that Petitioners (and other independent—small businessmen—coal operators/miners like them) have impliedly consented to warrantless inspections.[12]

11. (Cont'd.)
typical policeman's search for the fruits and instrumentalities of crime. For this reason alone, *Frank* differed from the great bulk of Fourth Amendment cases which have been considered by this Court. But we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely 'peripheral.' It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." (Footnotes omitted.) 387 U. S. at 530.

12. At least one federal court has concluded that the inspection provisions of the Act are unreasonable with respect to the kind of mining operations considered by that court. *See, e.g., Marshall v. Douglas Dewey and Waukesha Lime & Stone Co.*, No. 79-C-114 (E. D. Wis. May 30, 1979) where, on motion for reconsideration, the court denied plaintiff's motion for a preliminary injunction to prevent defendant from denying federal mine inspectors access to its lime stone quarry. *See also Marshall v. Halquist Stone Co.*,

Even where implied consent to warrantless administrative inspections is found, however, this Court has required that the government demonstrate that federal interests claimed to support the need for such inspections are sufficient to override the victim's expectation of privacy and that the "regulatory inspection system" is sufficiently limited in time, place and scope to protect the privacy expectations of the subject enterprises. *See, e.g., United States v. Biswell,* 406 U. S. at 315.

Hence, Petitioners also contend that the court below erroneously concluded that the Act's regulatory inspection scheme is "reasonable" in spite of the fact that it authorizes inspections of mines in their entirety three hundred and sixty-five days a year.[13] The Act places no restraints upon federal mine inspectors with respect to the time when inspections of a mine may be conducted or the portions of a mine that should be searched. If an operator objects to an inspection, and denies entry to a federal mine inspector—notwithstanding the nature or extent of the mine inspector's disruption of mining operations by his "spot"

12. (Cont'd.)
No. 78-C-463 (E. D. Wis. Sept. 15, 1978) in which the court denied preliminary injunctive relief to plaintiff where defendant operated a stone quarry subject to the Act.

But see Marshall v. Nolichuckey Sand Co., No. 79-1111 (6th Cir. Oct. 5, 1979) in which the court, relying upon the decision of the United States Court of Appeals for the Third Circuit (the court below in the present case) in *Marshall v. Stoudt's Ferry Preparation Co.,* 602 F. 2d 589 (3d Cir. 1979), *petition for cert. filed,* 48 U. S. L. W. 3274 (U. S. Oct. 13, 1979) (No. 79-614), concluded that the inspection provisions of the Act were not violative of the Fourth Amendment rights of the Appellant sand and gravel operation.

13. *See* Section 103(a), 91 Stat. 1297, 30 U. S. C. § 813(a), which provides that inspections of underground mines are to be conducted at least four times a year, but sets no maximum number of inspections which may be conducted, and does not limit the scope or frequency of such inspections.

inspections—the operator is cited for a violation of the Act,[14] an Order of Withdrawal is issued closing the mine,[15] and an automatic fine is assessed against the operator of the mine.[16] The inspection provisions of the Act are, therefore, unreasonable under the Fourth Amendment to the United States Constitution.

Warrantless non-consensual administrative searches of the nonpublic areas of business establishments were first held to be unreasonable *per se* by this Court in *See v. Seattle,* 387 U. S. 541 (1967). However, in *See,* this Court indicated that there might be exceptions to the general rule that such searches are unreasonable arising out of the nature of the business being subjected to the warrantless search:

> "We therefore conclude that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure. *We do not . . . question such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product.* Any constitutional challenge to such programs can only be resolved, as many have been in the past, on a case-by-case basis under the general Fourth Amendment standard of reasonableness. . . ." 387 U. S. at 545-546. (Emphasis added) (footnote ommitted.)

Two exceptions to the general requirement that a warrant be obtained prior to the administrative search of

14. Section 104(a), 91 Stat. 1297, 30 U. S. C. § 814(a).
15. Section 104(b), 91 Stat. 1300, 30 U. S. C. § 814(b).
16. Section 110(a), 91 Stat. 1311, 30 U. S. C. § 820(a).

the nonpublic areas of business enterprises were established by this Court in *United States v. Biswell,* 406 U. S. 311 (1972) and *Colonnade Catering Corp. v. United States,* 397 U. S. 72 (1970).

In *Colonnade* this Court considered the Constitutionality of a federal statute which permitted the Secretary of the Treasury or his delegate to enter the premises of liquor dealers during business hours without a warrant to examine records or documents relating to objects or articles subject to tax and the articles or objects themselves. This Court upheld the Constitutionality of the statute in *Colonnade* because the petitioner in that case was federally licensed, was pervasively regulated in the entire conduct of his business, and warrantless inspections of the objects of the petitioner's enterprise predated the Fourth Amendment to the United States Constitution. Therefore, the warrantless inspections authorized by the statute in *Colonnade* were held to be reasonable:

> "We agree that Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand. The general rule laid down in *See v. Seattle, supra,* at 545 —'that administrative entry, without consent, upon the portions of commercial premises which are not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure'—is therefore not applicable here. In *See,* we reserved decision on the problems of *'licensing programs'* requiring inspection, saying they can be resolved 'on a case-by-case basis under the general Fourth Amendment standard of reasonableness.' Id., at 546.
>
> "Where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply. . . .
>
> "What was said in *See* reflects this Nation's traditions that are strongly opposed to using force without definite authority to break down doors. *We deal here with the liquor industry long subject to close supervision and inspection. As respects that industry, and its various branches including retailers, Congress has broad authority to fashion standards of reasonableness for searches and seizures.* . . ." 397 U. S. at 76-77. (Emphasis added.)

In *Biswell* this Court upheld the Constitutionality of a federal statute authorizing treasury agents to conduct warrantless searches of the premises of firearms dealers during regular business hours to inspect firearms and ammunition and to inspect the records and documents which the statute required be kept on the premises. The respondent in *Biswell,* like the petitioner in *Colonnade,* was federally licensed. In addition, this Court found a long history of pervasive regulation of the firearms industry and that the statute in *Biswell* was carefully limited in time, place and scope:

> ". . . Emphasizing the historically broad authority of the Government to regulate the liquor industry and the approval of similar inspection laws of this kind in *Boyd v. United States,* 116 U. S. 616 (1886), we concluded that Congress had ample power 'to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand.' 397 U. S. at 76.
>
> . . .
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> * * *
>
> ". . . In the context of a regulatory inspection system of business premises that is carefully limited in time,

place, and scope, the legality of the search depends not on consent but on the authority of a valid statute.

"We think a like result is required in the present case, which involves a *similar inspection system aimed at federally licensed dealers in firearms.* Federal regulation of the interstate traffic in firearms is not as deeply rooted in history as is governmental control of the liquor industry, but close scrutiny of this traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in regulating the firearms traffic within their borders. See Congressional Findings and Declaration, Note preceding 18 U. S. C. § 922. Large interests are at stake, and inspection is a crucial part of the regulatory scheme, since it assures that weapons are distributed through regular channels and in a traceable manner and makes possible the prevention of sales to undesirable customers and the detection of the origin of particular firearms." 406 U. S. at 314, 315-316. (Emphasis added) (footnotes omitted.)

Recently, however, this Court held that the provisions of the Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U. S. C. §§ 651, *et seq.*, which purportedly authorized warrantless administrative searches of the nonpublic areas of business enterprises subject to that statute violated the respondent's rights under the Fourth Amendment to the United States Constitution. *Marshall v. Barlow's, Inc.*, 436 U. S. 307 (1978).

In *Barlow's* this Court stated that:

> "The Secretary urges that an exception from the search warrant requirement has been recognized for 'pervasively regulated business[es],' *United States v. Biswell*, 406 U. S. 311, 316 (1972), and for 'closely regulated' industries 'long subject to close supervision and inspection.' *Colonnade Catering Corp. v. United States*, 397 U. S. 72, 74, 77 (1970). These cases are indeed exceptions, but they represent responses to relatively unique circumstances. Certain industries have such a history of government oversight that no reasonable expectation of privacy, see *Katz v. United States*, 389 U. S. 347, 351-352 (1967), could exist for a proprietor over the stock of such an enterprise. Liquor (*Colonnade*) and firearms (*Biswell*) are industries of this type; when an enterpreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation.
>
> "Industries such as these fall within the 'certain carefully defined classes of cases,' referenced in *Camara, supra*, at 528. The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware. 'A central difference between those cases [*Colonnade* and *Biswell*] and this one is that *businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade*, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman in a regulated industry in effect consents to the restrictions placed upon him.' *Almeida-Sanchez v. United States*, 413 U. S. 266, 271 (1973)." 436 U. S. 313. (Emphasis added.)

In the present case, the history of regulation of mining operations is considerably shorter than the history of regulation of the firearms industry (considered in *Biswell*) or the liquor industry (considered in *Colonnade*) and slightly

longer than the history of regulation of respondent's enterprise in *Barlow's.* Prior to 1966, when existing federal coal mine health and safety regulations were amended to cover mines with fourteen or fewer employees, mines such as Petitioners' were not even arguably regulated. And mandatory health and safety regulations applicable to coal mines were not enacted until 1969.

The court below clearly misapplied this Court's prior holdings in *Colonnade, Biswell* and *Barlow's.* Moreover, this Court's decisions in *Colonnade, Biswell* and *Barlow's* provide an incomplete guide to those who may be victims of warrantless administrative searches conducted pursuant to statute and to the lower federal courts charged with determining whether statutes authorizing warrantless inspections violate the Fourth Amendment protection against unreasonable searches. This Court can better define the limits placed upon official inspection by the Fourth Amendment to the United States Constitution by issuing its Writ in the present case.

Clarification of this Court's holdings in *Colonnade, Biswell* and *Barlow's* is particularly necessary to guide those, such as Petitioners here, who are fined or otherwise penalized for challenging warrantless official inspections.

> "The Court's approach to searches by administrative agencies of regulated businesses presented an inherent difficulty. In analyzing this constitutional question on a case-by-case basis, the Court failed to articulate guidelines to which an individual could conform his behavior when faced with an administrative inspection. After *Colonnade* and *Biswell* it was clear that businesses which are pervasively regulated or which have long been subject to regulation may be inspected without a warrant where specifically authorized by statute. Although this problem is not unique to this area of law, it was difficult for a businessman to determine whether his business could be classified in either of these categories. As a result, to draw an analogy from the first amendment area, the Court effected a chill on the exercise of an individual's fourth amendment rights. If a businessman chose to deny entry to an inspector who did not have a search warrant, in the face of a statute which provided a penalty for such denial, he did so at the risk that his business did not fall within the *Colonnade-Biswell* exception." *When Are Administrative Inspections Warranted?* 50 U. of Colo. L. Rev. 231, 236 (1979).

The District Court in the present case believed that this Court's holding in *United States v. Biswell* established a "balancing test", impliedly recognized in *Marshall v. Barlow's, Inc.,* to be utilized in determining "if the warrant requirement was applicable in a specific context." 465 F. Supp. at 841.

> ". . . The *Biswell* Court, however, appeared to use a balancing test to decide if the warrant requirement was applicable in a specific context. Factors considered by the Court were the urgency of the federal interest furthered by the regulatory scheme, the possibility that the warrant requirement might impair the effectiveness of that scheme, the possibility of abuse of the power to conduct warrantless searches, and the threat of a warrantless search to a businessman's justifiable expectation of privacy. *United States v. Biswell, supra,* 406 U. S. at 315-17, 92 S. Ct. 1593. *See, Note: Administrative Search Warrants,* 58 Minn. L. Rev. 607, n. 41 (1974).
>
> "Although the *Biswell* 'balancing test' was not expressly embraced by the Supreme Court in *Bar-*

low's, we believe that many of the factors considered by the *Barlow's* Court in determining if a warrant was required under OSHA are those same factors enumerated in *Biswell. . . .*" 465 F. Supp. at 841.

The court below, citing its prior decision in *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F. 2d 589 (3d Cir. 1979), *petition for cert. filed,* 48 U. S. L. W. 3274 (Oct. 13, 1979) (No. 79-614), affirmed the holding of the District Court. In *Stoudt's Ferry,* the court below interpreted this Court's holding in *Barlow's* as establishing two criteria for determining whether warrantless inspections run afoul of the protections afforded by the Fourth Amendment to the United States Constitution:

> ". . . Aware in advance of the burdens of their trade, by choosing to accept the benefits these proprietors in effect consent to the restrictions. 436 U. S. at 413, 98 S. Ct. 1816. Otherwise, the reasonableness of a warrantless administrative search will depend upon the specific enforcement needs and privacy guarantees of the particular statute under review." 602 F. 2d at 593.

The court below improperly applied prior holdings of this Court because it concluded that the federal interests to be served by warrantless inspections of wholly owner-operated coal mines, such as Petitioners', which have no employee-miners, outweighed Petitioners' expectations of privacy—in spite of the facts that: (a) Petitioners hold no federal license to mine coal; (b) coal mining is not pervasively regulated except in the area of coal mine health and safety; and (c) the coal mining industry was not subject to mandatory federal health and safety regulations until 1969—and because it concluded that the inspection

provisions of the Act adequately protect Petitioners' privacy expectations.

This Court should issue its Writ in the present case to correct the error of the court below and better define the standards of reasonableness set by the Fourth Amendment to the United States Constitution so as to properly guide and protect the interests of those who may be victims of statutorily authorized administrative inspections.

CONCLUSION.

For the reasons set forth above, Petitioners respectfully pray that this Court issue its Writ of Certiorari directed to the United States Court of Appeals for the Third Circuit so as to bring before it for briefing, argument and decision the important questions of federal statutory and constitutional law presented by the instant Petition.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1005

MARSHALL, RAY, Secretary of Labor,
United States Department of Labor

v.

DONOFRIO, ROBERT, DONTON, RONALD, and RHEN, ROBERT, Individually and D. D. & R. COAL COMPANY, a co-partnership composed of Robert Donofrio, Robert Donton, and Robert Rhen

Bobby Donofrio, Ronald Donton and Robert Rhen, Individually and D. D. & R. Coal Company, as co-partnership composed of Bobby Donofrio, Ronald Donton and Robert Rhen,
Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D. C. Civil No. 78-2667)

Submitted Under Third Circuit Rule 12(6)
September 6, 1979
Before: ALDISERT, ROSENN and GARTH, *Circuit Judges.*

JUDGMENT ORDER.

After consideration of all contentions raised by appellants, and in light of our recent opinions in *Marshall v. Stoudt's Ferry Preparation Co.*, No. 78-2364 (3d Cir. July 19, 1979), and *Marshall v. Kraynak*, No. 78-2576 (3d Cir. Aug. 22, 1979), it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

By THE COURT,

R. ALDISERT
Circuit Judge

Attest:

THOMAS F. QUINN
Thomas F. Quinn, Clerk

DATED: September 6, 1979

APPENDIX B.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 78-2667

RAY MARSHALL, Secretary of Labor,
United States Department of Labor

v.

BOBBY DONOFRIO, RONALD DONTON and ROBERT RHEN, Individually and D. D. & R. COAL COMPANY, a co-partnership composed of BOBBY DONOFRIO, RONALD DONTON and ROBERT RHEN

OPINION AND ORDER.

HUYETT, *J.* November 16, 1978

Plaintiff Secretary of Labor has brought this action pursuant to the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U. S. C. §§ 801-825. (Coal Mine Act). The Secretary seeks to enjoin the defendants from denying authorized agents of the Secretary of Labor access to their coal mine. On September 1, 1978, we conducted a hearing on the motion for a preliminary injunction, with all parties represented.

Following the hearing, we determined that it would be inappropriate to grant preliminary injunctive relief. Nevertheless, the parties were able to stipulate to many facts at the hearing. In view of this, we asked the parties either to stipulate that the hearing be deemed a final hearing on a permanent injunction, or to file cross-motions for

summary judgment. The parties agreed to follow the latter course. Therefore, we now have pending before us cross-motions for summary judgment.[1]

The undisputed facts may be summarized as follows. Defendants Bobby Donofrio, Ronald Donton, and Robert Rhen, co-partners doing business as D. D. & R. Coal Company, are engaged in the business of mining anthracite coal in Schuylkill County, Pennsylvania. The only persons working in the mine operated by the partnership are the partners themselves. Michael Scheib is an authorized agent of the Secretary of Labor empowered to conduct coal mine inspections pursuant to the provisions of the Coal Mine Act. On May 12, 1978, Scheib conducted a routine inspection of the defendants' mine and found several violations of the Coal Mine Act. Scheib issued citations relative to these violations and gave the defendants until June 12, 1978 to remedy them.

On June 13, 1978, Scheib returned to inspect the mine and to see if the previously noted violations of the Coal Mine Act had been corrected. Scheib had no search warrant to inspect the coal mine. Defendants requested production of a search warrant and, when none was forthcoming, refused to admit Scheib to the mine. Scheib then issued a citation to the defendants under Section 104(a) of the Coal Mine Act, 30 U. S. C. § 814(a).

On or about June 15, 1978, Scheib returned to defendants' mine to conduct an inspection and was again refused admittance because he did not have a search warrant. At

1. No hearing was held on the motions for summary judgment. However, we held a lengthy hearing on the motion for a preliminary injunction, at which time the parties argued the legal issues which are presently before us. No new contentions have been made at this time which were not raised when the motion for a preliminary injunction was argued. In the absence of any request from counsel for oral argument, we believe that oral argument on the motions for summary judgment would be superfluous.

that point, Scheib issued an order of withdrawal against defendants' mine pursuant to Section 104(b) of the Act, 30 U. S. C. § 814(b).

The issues presented before us on this motion are very narrow. First, we must determine if the defendants are subject to the provisions of the Coal Mine Act or, as defendants strenuously argue, if they are exempt from the Coal Mine Act's coverage because the only persons who work in the mine are the defendants themselves. Second, we must consider whether, in view of *Marshall v. Barlow's, Inc.*, 46 U. S. L. W. 4483 (May 23, 1978), warrantless inspections made pursuant to the Coal Mine Act comport with the Fourth Amendment.

I.

Defendants claim that the Coal Mine Act does not cover mines that are totally owned and operated by the same persons; that is, those mines where the only persons working therein are the owners themselves. We cannot accept this argument. The Coal Mine Act clearly states that it applies to all coal mines "the products of which enter commerce, or the operations or products of which affect commerce"[2] and "each operator and every miner" in such mine. 30 U. S. C. § 803. We find no explicit exemption in the Coal Mine Act for owner-operated mines, and defendants' counsel at oral argument conceded that there was none.

Defendants argue, however, that the exemption to the Coal Mine Act for owner-operated mines is implicit in the Act's total regulatory scheme. This assertion is based upon an examination of the legislative history, in which Con-

2. At the hearing, counsel for defendants stated they did not contest the fact that the operations of their coal mine "affected commerce."

gress stated repeatedly that a major purpose of the Act was to prevent mine owners and operators from compromising the health and safety of miners, and upon an examination of the provisions of the statute. Defendants assert that these two sources make it clear that miners and owners or operators are not intended to be the same persons. From this conclusion, defendants infer that owner-operated mines were intended to be excluded from the Act.

We find this argument to be unpersuasive. We believe that the Coal Mine Act's broad definition of "miner" as "*any* individual working in a coal . . . mine" rebuts any inference that a "miner" cannot also be an owner or operator. 30 U. S. C. § 802(g). This definition should be compared with the definition of "miner" formerly employed for purposes of "Black Lung" benefits—"any individual who is or was *employed* in a coal mine." 30 U. S. C. § 902(d).[3] We believe that Congress had a purpose for using different language to define "miner" in these two separate portions of the same Act. For purposes of Black Lung benefits, the employer-employee relationship was significant, and self-employed miners were held to be excluded from the Act's coverage. *See Yenetskie v. Secretary of Health, Education and Welfare,* 426 F. Supp. 1372 (E. D. Pa. 1972). However, for our purposes, no such distinction is made. Miners like defendants who also operate the mines in which they work are nonetheless "individual[s] working in a coal . . . mine."

Finally, there is evidence that Congress was expressly made aware of the possibility that owner-operated mines

3. The definition of "miner" for purposes of Black Lung Benefits was changed by the Black Lung Benefits Reform Act of 1977, Pub. L. 95-293, 92 Stat. 95, to encompass "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." Thus, under this amendment, owners or operators who also work in coal mines may be eligible for Black Lung Benefits.

would be included within the Coal Mine Act's coverage at the time the Act was amended in 1966 to extend coverage to mines employing less than fifteen men underground. *See* S. Rep. No. 1455, *reprinted at* 1966 U. S. Code Cong. & Admin. News 2087 (Statement of Senator Cooper). Although Congress was aware of the problem, it chose not to exempt such mines at that time or at any time subsequent.[4] We cannot conclude, therefore, that the failure explicitly to exempt owner-operated mines from the Act was the result of mere inadvertence.

When faced with the same issue we are faced with here, Judge Muir concluded that, "[A]lthough it seems entirely rational that it would do so, the [Coal Mine Act] does not exempt mines which are owner operated." *Secretary of the Interior v. Shingara,* 418 F. Supp. 693 (M. D. Pa. 1976). We agree, and therefore conclude that defendants are subject to the jurisdiction of the Coal Mine Act.

II.

Having found that defendants are subject to the provisions of the Coal Mine Act, we now proceed to decide whether the Secretary's agent had a right to inspect the defendants' coal mine without a search warrant. Section 201(a) of the Coal Mine Act, 30 U. S. C. § 813(a), authorizes representatives of the Secretary to make frequent inspections of coal mines. The legislative history makes it clear that the right to inspect was intended to be absolute, without the need to obtain a warrant. Sen. Rep. No. 95-181, *reprinted at* U. S. Code Cong. & Admin. News 3427.

4. We note that a bill was introduced in the House of Representatives in December, 1977, which would exempt mines of two or fewer individuals from coverage under the Act. See H. R. 10324. This bill has not been enacted to date.

We must begin our analysis with an examination of *Marshall v. Barlow's, Inc.*, 46 U. S. L. W. 4483 (May 23, 1978), where the Supreme Court held that warrantless searches pursuant to the Occupational Safety and Health Act of 1970 (OSHA) were violative of the Fourth Amendment to the Constitution. However, the Court's opinion further stated that the holding did not necessarily invalidate warrantless searches under other statutory schemes.

Section 8(a) of OSHA, the section challenged in *Barlow's*, empowers OSHA inspectors to search the work area of any employment facility within the Act's jurisdiction, which includes every private employer engaged in a business affecting commerce. 29 U. S. C. § 652(5). There is no express requirement in OSHA that a warrant be obtained prior to an inspection. The Supreme Court held that a warrantless search is unreasonable in the absence of a recognized exception to the warrant requirement, and concluded that no such exception was applicable to OSHA searches.

One of the exceptions to the warrant requirement discussed at length by the *Barlow's* Court, is the so-called "closely-regulated industry" exception. This exception stems from two Supreme Court cases: *Colonnade Corporation v. United States*, 397 U. S. 72 (1970), and *United States v. Biswell*, 406 U. S. 311 (1972). In those cases, warrantless searches were deemed permissible when employed in connection with certain closely-regulated enterprises because "certain industries have such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such enterprise." *Marshall v. Barlow's, Inc., supra* at 4484.

In *Biswell*, a case which we believe merits close examination, the Supreme Court held that the interstate sale of firearms was a closely-regulated industry. The *Biswell*

Court, however, appeared to use a balancing test to decide if the warrant requirement was applicable in a specific context. Factors considered by the Court were the urgency of the federal interest furthered by the regulatory scheme, the possibility that the warrant requirement might impair the effectiveness of that scheme, the possibility of abuse of the power to conduct warrantless searches, and the threat of a warrantless search to a businessman's justifiable expectation of privacy. *United States v. Biswell, supra* at 315-17. *See Note: Administrative Search Warrants,* 58 Minn. L. Rev. 607, n. 41 (1974).

Although the *Biswell* "balancing test" was not expressly embraced by the Supreme Court in *Barlow's*, we believe that many of the factors considered by the *Barlow's* Court in determining if a warrant was required under OSHA are those same factors enumerated in *Biswell*. In determining whether to apply the "closely-regulated industry" exception the Supreme Court in *Barlow's* emphasized the pervasiveness of the regulation in a given industry and whether, in view of that pervasiveness, a businessman can be deemed to have impliedly consented to a search by entering the industry in the first instance. 46 U. S. L. W. at 4484-85. However, the Court proceeded to consider the effect of a warrant requirement on the enforcement of OSHA and the "unbridled discretion" that OSHA's warrantless search requirement ceded to administrative officials. We conclude that *Barlow's* mandates that lower courts examine several factors in determining the reasonableness of a warrantless search under a particular statutory scheme, and balance those factors carefully in reaching its conclusion. *See generally The Constitutionality of Warrantless OSHA Inspections,* 22 Vill. L. Rev. 1214 (1977).

In considering the factors set forth in *Biswell* and *Barlow's* as applied to the problem at hand, we emphasize

first the lengthy history of pervasive regulation in the coal mine industry, particularly in the area of safety. The coal mine industry has been regulated since the early part of this century; inspections have been authorized since 1940. In *Youghiogheny & Ohio Coal Co. v. Morton*, 364 F. Supp. 45 (S. D. Ohio 1973) (three-judge court), the court, after a detailed discussion of the history of regulation in the coal mine industry, concluded that coal mining was a closely regulated industry within the *Colonnade-Biswell* exception. We agree. Although the history of regulation may not be so long as in the alcohol or firearm industries, we believe that the history of regulation in the coal mine industry is sufficiently extensive so that anyone entering the field would be aware of the extent of the regulation and would have little justifiable expectation of privacy with respect to safety regulation.

Second, we note that the regulatory scheme here covers a single industry, in contrast to the wide-ranging scheme contained in OSHA covering all industries which affect commerce. *Marshall v. Barlow's, supra* at 4485. The significance of this narrow focus lies in the increased possibility that a businessman engaged in the industry will be aware of the nature and scope of the regulation. This additional notice tends to lessen any justifiable expectation of privacy.

Third, urgent federal interests are served by inspections under the Coal Mine Act. The primary interest relates to the safety of miners; however, a significant economic interest is implicated as well. As our country becomes more dependent upon coal as an energy source, it becomes more vital to keep coal mines safe and operational.

We believe the possibility that a warrantless search will be abused is less under the provisions of the Coal

Mine Act than under the statutory scheme invalidated in *Barlow's*. Under OSHA, broad authorization to inspect was given with practically no limits set upon the scope of the search. *See Marshall v. Barlow's, Inc., supra*, at n. 2' By contrast, the Coal Mine Act states with specificity t[illegible] purpose and frequency of inspections. 30 U. S. C. § 813(a). Section 201(a) of the Coal Mine Act requires that the Secretary conduct inspections of underground coal mines at least four times per year for the purposes of determining whether an imminent danger exists and determining if there is compliance with mandatory health and safety standards or previously issued citations. *Id.* In the case before us, the actual purpose of the inspection was to ascertain if prior violations of the Act had been abated. This is a purpose clearly authorized by the statute.

Finally, we believe that a warrant requirement would hamper inspection efforts authorized by the Coal Mine Act. This was clearly the conclusion of Congress. The Senate Report, citing to the *Youghiogheny* case with approval, stated that the "right of entry" provided for in Section 201(a) was intended to be an absolute right, without the need to obtain a warrant. Sen. Rep. No. 95-181, *reprinted at* 1977 U. S. Code Cong. & Admin. News 3427. The Report adds, "Indeed, in view of the notorious ease with which many safety or health hazards may be concealed if advance warning of inspections is obtained, a warrant requirement would seriously undercut the Act's objectives." *Id.*

Of course, the fact that a warrant requirement may hamper a regulatory scheme, by itself, is not a reason for abolishing the warrant requirement. However, in this case, in view of the limits on inspections set by the Coal Mine Act and the lowered expectation of privacy of a

party entering the coal mine industry, there are few countervailing reasons for requiring a warrant. *See United States v. Biswell, supra* at 316.

Defendants argue that the *Colonnade-Biswell* exception extends only to federally-licensed businesses. However, the language used by *Barlow's* is "closely regulated industry," not federally licensed industry. Therefore, we do not believe federal licensure is a prerequisite to application of the *Colonnade-Biswell* exception.

After considering all of the foregoing factors, we conclude that warrantless inspections conducted under Section 201(a) of the Coal Mine Act do not run afoul of the rationale of *Marshall v. Barlow's*, or the restraints of the Fourth Amendment.

We therefore grant plaintiff's motion for summary judgment and enjoin the defendants from denying authorized agents of the Secretary of Labor access to their coal mine.

DANIEL H. HUYETT, 3RD

J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 78-2667

RAY MARSHAL, Secretary of Labor
United States Department of Labor

v.

BOBBY DONOFRIO, RONALD DONTON and ROBERT RHEN, Individually and D. D. & R. COAL COMPANY, a co-partnership composed of BOBBY DONOFRIO, RONALD DONTON and ROBERT RHEN

ORDER.

Now, November 16, 1978, upon consideration of the parties' cross-motions for summary judgment, and for the reasons set forth in the accompanying memorandum, IT IS ORDERED that the plaintiff's motion for summary judgment is GRANTED and the defendants' motion for summary judgment is DENIED. IT IS FURTHER ORDERED that the defendants are enjoined from denying authorized agents of the Secretary of Labor access to their coal mine.

DANIEL H. HUYETT, 3RD

J.

Supreme Court, U. S.
FILED
JAN 30 1980
MICHAEL RODAK, JR., CLERK

No. 79-848

In the Supreme Court of the United States

OCTOBER TERM, 1979

ROBERT DONOFRIO, ET AL., PETITIONERS

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is reported at 605 F. 2d 1196 (table). The opinion of the district court (Pet. App. A3-A12) is reported at 465 F. Supp. 838.

JURISDICTION

The judgment of the court of appeals (Pet. App. A2) was entered on September 6, 1979. The petition for a writ of certiorari was filed on December 3, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that the provisions of the Federal Mine Safety and

Health Act of 1977, 30 U.S.C. (and Supp. I) 801 *et seq.* (Mine Act), apply where the only persons working in a mine are three partners who own and operate it.[1]

2. Whether the court of appeals correctly concluded that provisions in the Mine Act authorizing warrantless safety and health inspections of mines are constitutional.

STATEMENT

On May 12, 1978, an authorized representative of the Secretary of Labor went to D. D. & R. Coal Company's Diamond Slope coal mine in Schuylkill County, Pennsylvania, to conduct a routine inspection pursuant to 30 U.S.C. (Supp. I) 813(a).[2] The inspector was admitted

[1]The Federal Coal Mine Health and Safety Act of 1969 was amended, effective March 9, 1978, and renamed the Federal Mine Safety and Health Act of 1977. See Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290.

[2]30 U.S.C. (Supp. I) 813(a) reads as follows:

> Authorized representatives of the Secretary [of Labor] or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.

to the mine and found several violations of the Mine Act. He then issued citations for the violations and gave D. D. & R. Coal until June 12, 1978, to abate them (Pet. App. A4; A. 5a).[3]

When the inspector returned to the mine on June 13, 1978, petitioners refused to admit him, asserting that he needed a search warrant. The inspector then issued a citation (Pet. App. A4) and set June 14 at 9:00 a.m. as the deadline for abating the denial of entry violation (A. 11a). On June 15, the inspector returned and again was denied entry to the mine. He then issued five "withdrawal orders," pursuant to 30 U.S.C. (Supp. I) 814(b),[4] in connection with certain of the violations cited previously and extended the time within which D. D. & R. Coal was to abate other violations (*ibid.*).

[3]"A." refers to the appendix in the court of appeals.

[4]30 U.S.C. (Supp. I) 814(b) reads as follows:

> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by

The Secretary of Labor then brought this action in the United States District Court for the Eastern District of Pennsylvania to enjoin petitioners, who own and operate D. D. & R. Coal, from refusing to allow duly authorized inspections. The district court entered summary judgment in the Secretary's favor (Pet. App. A13). The court held that the Mine Act covers mines such as D. D. & R. Coal in which the owners are the only miners (*id.* at A5-A7). The court also held that warrantless inspections under the Act "do not run afoul of the rationale of *Marshall* v. *Barlow's*, [436 U.S. 307 (1978),] or the restraints of the Fourth Amendment" (*id.* at A12).[5] The court of appeals affirmed per curiam (Pet. App. A1-A2).

ARGUMENT

In affirming the grant of injunctive relief against petitioners, the court of appeals relied exclusively on its recent opinions in *Marshall* v. *Kraynak*, 604 F. 2d 231 (3d Cir. 1979), cert. denied, No. 79-586 (Jan. 7, 1980), and *Marshall* v. *Stoudt's Ferry Preparation Co.*, 602 F. 2d 589 (3d Cir. 1979), cert. denied, No. 79-614 (Jan. 7, 1980). In *Kraynak*, the court of appeals held that Congress intended the Mine Act to cover mines in which

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the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

[5]The district court erroneously referred to warrantless inspections conducted "under Section 201(a)" of the Mine Act (Pet. App. A12; see also *id.* at A7). As shown by the court's reference to the coordinate United States Code section, 30 U.S.C. 813(a), the inspections were carried out pursuant to Section 103(a) of the Act. The fact that Section 103(a) was amended by Section 201 of the Federal Mine Safety and Health Amendments Act of 1977 (see note 1, *supra*) probably accounts for the error.

the owners are the only miners. In *Stoudt's Ferry*, the court of appeals held that the Mine Act provisions authorizing warrantless health and safety inspections of mines do not violate the Fourth Amendment.[6] The Secretary's briefs in opposition in *Kraynak* and *Stoudt's Ferry* explain that each of these decisions is correct and does not conflict with any decision of this Court or another circuit.[7]

In denying certiorari in *Kraynak* and *Stoudt's Ferry*, the Court recently declined to review issues identical to those now raised by petitioners. There is no greater reason to grant review here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

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JANUARY 1980

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[6]The Fourth Circuit recently reached the same conclusion in *Marshall* v. *Sink*, No. 77-2614 (Jan. 24, 1980).

[7]We are providing petitioners with copies of the Secretary's briefs in opposition in *Kraynak* and *Stoudt's Ferry*.

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